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Nos. 85-954, 85-955

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JAPAN WHALING ASSOCIATION, *et al.*,
Petitioners,

v.

AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

MALCOLM BALDRIGE, *et al.*,
Petitioners,

v.

AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for The District of Columbia Circuit

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BRIEF FOR PETITIONERS JAPAN WHALING ASSOCIATION, *ET AL.*

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QUESTIONS PRESENTED

1. Whether domestic statutes require the Secretary of Commerce to determine and certify that, because Japanese nationals are taking certain species of whales in excess of international quotas by which Japan is not bound because it filed formal objections to them, the Japanese nationals are diminishing the effectiveness of the international convention under which the quotas were established, even though Japan has agreed with the United States (a) to withdraw, irrevocably, its formal objections to the quotas, (b) to limit its harvest of whales to numbers that scientific evidence indicated to the Secretary's satisfaction would not endanger the species of whales in question, and (c) to cease commercial whaling operations in 1988, which is two years later than when quotas established under the international convention will reach zero for all species of whales.

2. Whether a federal court may and, if it may, whether in the circumstances of this case it should order a Cabinet officer to make a determination and certification under a statute phrased generally and ambiguously when the result of the certification would be to breach an agreement between the United States and a friendly foreign nation and to impose severe punitive sanctions on that nation and its nationals.

THE PARTIES

The petitioners named in the captions were defendant-intervenor and defendant and appellants below. In addition, Japan Fisheries Association and Secretary of State George P. Shultz were defendant-intervenor and defendant, respectively, and appellants below. The plaintiffs and appellees below, respondents in this Court, are, in addition to the American Cetacean Society, the Animal Protection Institute of America, Animal Welfare Institute, Center for Environmental Education, Connecticut Cetacean Society, Defenders of Wildlife, Friends of the Earth, The Fund for Animals, Greenpeace U.S.A., Thomas Garrett, The Humane Society of the United States, International Fund for Animal Welfare, and The Whale Center.

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MALCOLM BALDRIGE, ET AL., PETITIONERS

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-55a)[1] is reported at 768 F.2d 426. The opinion of the district court (Pet. App. 56a-84a) is reported at 604 F. Supp. 1398.

JURISDICTION

The judgment of the court of appeals (Pet. App. 90a-91a) was entered on August 6, 1985. Petitions for rehearing were denied on October 11, 1985 (Pet. App. 92a-99a). Petitions for a writ of certiorari were filed on December 4, 1985 and were granted on January 13, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "Pet. App." refers to the appendix to the petition in No. 85-955. "J.A." and "S.A." refer to the court of appeals appendices, copies of which have been lodged with the Clerk of this Court.

STATUTES INVOLVED

The relevant statutes are reproduced in Addendum I, *infra*, 1a-2a.

STATEMENT

Section 8(a)(1) of the Fishermen's Protective Act of 1967 (the Pelly Amendment) provides that the Secretary of Commerce shall certify to the President if the nationals of a foreign country "are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program." 22 U.S.C. 1978(a)(1).[2] Upon certification, the President may, in his discretion, prohibit importation of fishery products from the certified nation. 22 U.S.C. 1978(a)(4). Section 201(e)(2) of the Magnuson Fishery Conservation and Management Act (the Packwood Amendment) contains a similar certification provision, directed specifically to whaling, that results in mandatory imposition of severe economic sanctions. See 16 U.S.C. 1821(e)(2).[3] Under those provisions, if the Secretary of Commerce certifies that nationals of a foreign country are conducting whaling operations in a manner that "diminishes the effectiveness" of the International Convention for the Regulation of Whaling (ICRW), the Secretary of State must reduce, by at least 50%, the foreign nation's fishery allocation in the United States' fishery conservation zone. 16 U.S.C. 1821(e)(2).

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[2] The Fishermen's Protective Act of 1967, 22 U.S.C. 1971 *et seq.*, is generally designed to provide compensation to fishermen whose vessels are seized by foreign nations based on jurisdictional claims not recognized by the United States.

[3] The Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, enacted in 1976, established a United States fishery conservation zone extending 200 nautical miles seaward from the United States' coast. See 16 U.S.C. 1811. The United States exercises exclusive fishery management authority within the conservation zone (16 U.S.C. 1812) and generally may allocate surplus fishery resources—which would not be used by United States fishermen—to foreign countries in accordance with various criteria in the Act (16 U.S.C. 1821).

The central issue in these consolidated cases is whether the Pelly and Packwood Amendments allow the Secretary of Commerce no discretion in determining whether to certify an ICRW party that formally objects to and departs from whale harvesting quotas. Respondents, a coalition of private wildlife organizations, contend that the Secretary must certify a foreign nation whenever its nationals exceed, in any amount and under any circumstances, a whaling harvest quota established under the ICRW. The court of appeals agreed and affirmed the issuance of a writ of mandamus ordering the Secretary to certify Japan. The order would compel the imposition of severe economic sanctions[4] on an important foreign ally, culturally and historically committed to whaling, that has entered into a formal agreement with the United States—already partially performed—to rescind its objections and effectively terminate its commercial whaling industry by April 1, 1988.

1. The International Convention for the Regulation of Whaling (ICRW), Dec. 2, 1946, 62 Stat. 1716 *et seq.* (entered into force Nov. 10, 1948), provides the principal international mechanism for promoting the conservation and development of whale populations. The ICRW, proposed by the United States in 1946, is implemented pursuant to the Whaling Convention Act, 16 U.S.C. 916 *et seq.* It originally responded to a worldwide decline in whale harvests following World War II.[5] The ICRW was expressly intended to "provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry." 62 Stat. 1717. Originally signed by 15 countries and designed for the benefit of whaling nations, the ICRW now has 41 signa-

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[4] The Japanese petitioners estimate that a 50% reduction in Japan's fishery allocation "would cost Japanese nationals $1.8 billion" (85-954 Pet. 12).

[5] See, *e.g.*, Scarff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment*, 6 Ecology L. Q. 323, 352-353 (1977); see generally Smith, *The International Whaling Commission: An Analysis of the Past and Reflections on the Future*, 16 Nat. Resources Law. 543 (1984).

tories, most of which have either discontinued or have never engaged in commercial whaling.[6] As the membership of non-whaling nations has grown, the ICRW increasingly has been utilized to protect whales from overexploitation.

The ICRW regulates whale harvesting practices through a Schedule which, among other matters, sets harvest limits for whale species. Art. I, 62 Stat. 1717; see 62 Stat. 1723-1727.[7] The ICRW also establishes the International Whaling Commission (IWC), a multi-national deliberative body that implements portions of the convention. Art. III, 62 Stat. 1717-1718. The IWC is composed of one commissioner from each member country, whether a whaling or a non-whaling nation (*ibid.*). The IWC, through a three-fourths' majority vote of its members, may amend the Schedule, including the harvest limits. Art. V, 62 Stat. 1718-1719. The ICRW expressly provides that a member country may file objections to IWC amendments of the Schedule (*id.* at 1719). If the country files a timely objection, it is under no obligation to comply with the amendment; however, the amendment will apply to non-objecting countries (*ibid.*).

Since the early 1970s, the IWC meetings have proven increasingly volatile and politicized as member countries have split into sharply polarized camps.[8] The whaling

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[6] The eight countries traditionally identified as commercial whaling nations are Japan, the Soviet Union, the Republic of Korea, Iceland, Norway, Peru, Chile, and Spain. Japan, which joined the ICRW in 1951, is generally recognized as the most significant of the remaining whaling countries. The United States, which was once a major commercial whaling nation, discontinued its whaling activities in 1971.

[7] The original Schedule set forth requirements for inspection of whaling operations (62 Stat. 1723), prohibitions on the taking of various whales (*id.* at 1723-1724), harvest quotas based on "blue-whale units" (*id.* at 1724), minimum size limitations (*id.* at 1724-1725), methods of factory ship operation (*id.* at 1725), and harvest reporting requirements (*id.* at 1726).

[8] Congressional staff reports, written from the non-whalers' perspective, describe the emotion and acrimony of recent sessions. See,

nations, including Japan, the Soviet Union, and Norway, have contended that the scientific evidence supports continued whaling of selected species. The non-whaling nations, including the United States, have supported stricter harvest limits and, as a conservative management measure, a general moratorium on commercial whaling.[9] Following long and fierce debates, the IWC recently reached specific decisions on two particularly controversial topics —sperm whale quotas and a general commercial whaling moratorium—that are central to the present dispute.

In 1981, the IWC, acting on the advice of its Scientific Committee, reduced the yearly harvest quota for the Western Division Stock of North Pacific sperm whales—a coastal stock harvested only by Japanese whalers—from 890 adult males to zero adult males (Pet. App. 11a, 45a-46a, 65a).[10] Soon thereafter, Japan filed a timely objection (*ibid.*). However, in 1982, prior to any Japanese whaling pursuant to this objection, the IWC provided a temporary suspension of the quota, permitting Japan to harvest 450 sperm whales in the 1982 coastal season and

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e.g., *Review of the 34th International Whaling Commission Meeting: Hearing Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. 3-25 (1982) [hereinafter cited as *Review of the 34th IWC Meeting*]; *Review of the 33d International Whaling Commission Meeting: Hearing Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. 2-15 (1981) [hereinafter cited as *Review of the 33d IWC Meeting*].

[9] As a result, the non-whaling nations generally have been successful in reducing harvest quotas. The total commercial harvest quota, covering all species, fell from 45,673 whales in 1973 to 12,371 whales in 1982. See *Review of the 34th IWC Meeting* 100.

[10] The Scientific Committee, which provides the IWC with assessments of whale populations, recommended a zero quota in 1981, based on its uncertainty concerning the population's size. See *Review of the 33d IWC Meeting* 6. The Seychelles, one of the most vocal whale conservation proponents, suggested that new scientific evidence could reopen discussion of sperm whale quotas (*ibid.*).

400 sperm whales in the 1983 coastal season.[11] In 1983, the Japanese Commissioner requested the Scientific Committee to consider whether Japan's present catch had any significant effect on the sperm whale population of the Western Division Stock. The Scientific Committee responded in 1984 that continued harvests of 400 sperm whales per year for up to five years would have only a small effect on the stock in the short term. The Committee could not reach a consensus on the potential long-term effects of that harvest level.[12] In 1984, the temporary suspension of the zero quota for the Western Division Stock lapsed by its own terms and the zero quota once again went into force. Japan continued its objection and thus retained an exemption from that quota (*id.* at 11a-12a, 46a, 65a-66a).

During this same period, the IWC also considered suggestions for whaling moratoria. In 1982, the IWC adopted a moratorium on all commercial whaling effective at the beginning of the 1985/1986 pelagic whaling season (which began in fall 1985) for high seas whaling and at the start of the 1986 coastal season (which applies to any coastal whaling commencing in 1986) for coastal whaling (Pet. App. 11a, 47a, 66a). The moratorium had long been urged by the United States as a conservative management measure in light of the lack of sufficient data to make accurate population projections for many whale stocks. The IWC has determined that the moratorium will be reconsidered by 1990, but will remain in effect

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[11] The Scientific Committee was unable to reach any consensus on the status of the population at that time. See *Review of the 34th IWC Meeting* 9.

[12] The 1984 Scientific Committee Report specifically states:

> The Committee agreed that, if continued for a short period (possibly up to five years), catches in line with the current catch limit of 400 would have only a small effect on the stock in the short term. The Committee was unable to agree on what the long term effect on the stock of such catches might be.

Report of the Scientific Committee (IWC 36/4) ¶ 10.1.1.7 (May 26, 1984). The Committee's full response to the Japanese request is set out as Addendum II, *infra*, 3a.

until changed by a three-fourths vote of IWC members. Japan, Norway, and the Soviet Union filed timely objections to the moratorium. Peru also filed an objection but later withdrew it.

In autumn 1984, the United States informed Japan that the Pelly and Packwood Amendments might be invoked in response to the sperm whaling activities of Japanese nationals. Japan, in reply, entered into discussions with the Departments of State and Commerce to reach a solution that would satisfy the concerns of both countries.[13]

On November 13, 1984, following extensive negotiations, Japan and the United States concluded an executive agreement through an exchange of letters between the Charge d'Affaires of Japan and the Secretary of Commerce (Pet. App. 102a-109a). Subject to implementation (as described in note 14, *infra*), the Government of Japan pledged to adhere to strict harvest limits and to cease commercial whaling by 1988 (Pet. App. 102a-106a). In response to this pledge, the Secretary determined, after review of IWC Scientific Committee opinions and consultation with the United States Commissioner to the IWC, that the short-term continuance of a specified level of limited whaling by Japan, coupled with its promise to phase out and discontinue all commercial whaling by 1988, would not "diminish the effectiveness" of the ICRW (*id.* at 107a-109a). Accordingly, the Secretary in-

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[13] The Soviet Union and Norway would also be potentially subject to certification if they continued their whaling after the commencement of the moratorium. However, the Soviet Union has already been certified as a consequence of its minke whaling activities and Norway does not receive fishery allocations in the United States' fishery conservation zone. See *U.S. Policy with Respect to the International Protection of Whales: Hearing and Mark-up on H.R. Con. Res. 54 Before the House Comm. on Foreign Affairs and its Subcomm. on Human Rights and International Organizations*, 99th Cong., 1st Sess. 53 (1985) [hereinafter cited as *1985 House Hearing*].

formed Japan that certification would not be necessary provided that Japan complied with its pledge (*ibid.*).[14]

On December 11, 1984, Japan fulfilled the first part of the agreement by withdrawing its objection to the IWC sperm whale quota, effective April 1, 1988 (Pet. App. 110a, 112a-114a). That irrevocable action will bring to an end Japanese commercial sperm whaling activities.

2. Several days before consummation of the November 13, 1984 executive agreement, respondents filed suit in the United States District Court for the District of Columbia, requesting a writ of mandamus compelling the Secretary to certify Japan.[15] The Japan Whaling Association and the Japan Fishing Association (the Japanese petitioners), trade groups representing private Japanese interests, intervened.

On March 5, 1985, the district court granted summary judgment for respondents and ordered the Secretary to

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[14] The details of the Japanese commitments were explained in a summary accompanying the letter from the Charge d'Affaires to the Secretary. First, it was agreed that if Japan would withdraw its objection to the IWC zero sperm whale quota, Japanese whalers could harvest up to 400 sperm whales in each of the 1984 and 1985 coastal seasons without triggering certification. Japan's irrevocable withdrawal of that objection was to take place on or before December 13, 1984, effective on April 1, 1988. This undertaking would effectively end Japanese commercial sperm whaling.

Second, the two nations agreed that if Japan would end *all* commercial whaling by April 1, 1988, Japanese whalers could take additional whales in the interim without triggering certification. Under that part of the agreement, Japan would harvest no more than 200 sperm whales in each of the 1986 and 1987 coastal seasons. In addition, it would restrict its harvest of other whales—under limitations acceptable to the United States, using the most recently voted IWC quota for those whales as a guideline—through the end of the 1986/87 pelagic season and the end of the 1987 coastal season. The agreement called for Japan to announce its commitment to terminate all commercial whaling operations by withdrawing its objection to the IWC moratorium, on or before April 1, 1985, effective April 1, 1988.

[15] These groups later urged Congress to condemn the agreement. See *1985 House Hearing* 13. Congress took no action in response to their request.

certify Japan at once (Pet. App. 56a-86a). The district court observed that the Secretary was required to certify nations that "diminish the effectiveness" of the ICRW, but noted that neither the Pelly nor the Packwood Amendment defined that crucial phrase. The court nevertheless concluded that Congress intended the phrase to deprive the Secretary of all discretion to withhold certification whenever a country exceeds, by any amount and in any circumstances, an IWC harvest quota (*id.* at 83a-84a, 85a-86a). The district court denied the government's motion for a stay pending appeal; however, the court of appeals granted a stay on March 18, 1985 (*id.* at 87a-89a). Shortly thereafter, on April 5, 1985, the Government of Japan informed the Secretary of Commerce that Japan would perform the second condition of the agreement—withdrawal of its objection to the IWC moratorium—provided that the United States obtained reversal of the district court's order (*id.* at 116a-119a).

On August 6, 1985, a divided court of appeals upheld the district court order requiring immediate certification of Japan (Pet. App. 1a-55a). The court found that the Pelly and Packwood Amendments did not define the specific activities that would "diminish the effectiveness" of the ICRW; it therefore looked for enlightenment in the legislative history (*id.* at 22a). Based on its examination (*id.* at 22a-41a), the court concluded that the Secretary of Commerce has no discretion in determining whether to certify a nation whose whalers depart from the IWC harvest quotas. It stated (*id.* at 41a-42a):

> Where a foreign nation allows its nationals to fish in excess of recommendations set forth by an international fishery conservation program, it has *per se* diminished the effectiveness of that program. In such a case the Secretary is mandated to certify the foreign country under the Pelly Amendment. Specifically, where a foreign country's nationals harvest whales in excess of IWC harvest quotas, certification is mandatory and nondiscretionary.

The court of appeals concluded that mandamus was appropriate because "the Secretary had a nondiscretionary

duty in these circumstances to certify Japan" (*id.* at 42a).

Judge Oberdorfer, sitting by designation, dissented (Pet. App. 45a-55a). He observed that this dispute involved delicate foreign relations issues directly affecting the United States' relations with Japan (*id.* at 49a-51a). He stated that the foreign repercussions of this dispute "heighten the need for forbearance by the courts in the absence of a clear command from Congress" (*id.* at 51a). In his view, the legislative history relied upon by the court was "far from conclusive" (*id.* at 52a) and "does not so plainly alter the language of the statute as to leave the Secretary no discretion to decide whether Japan's stance *vis a vis* the [IWC] quota and the moratorium 'diminishes the effectiveness' of the Convention" (*id.* at 53a). Furthermore, he concluded that a mandamus remedy was inappropriate in light of the international relations implications and equities of the case (*id.* at 54a-55a).[16]

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States and Japan have successfully employed diplomacy to resolve the delicate issue of Japanese whaling. The resulting executive agreement—already partially performed—will lead to the effective termination of Japan's commercial whaling industry by April 1, 1988. This agreement is a salutary achievement; it has produced, *for the first time*, a binding commitment from the world's premier whaling nation to comply with a comprehensive commercial whaling moratorium. The agreement advances the worldwide interest in preserving whale populations. At the same, it recognizes that our

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[16] Petitions for rehearing and suggestions for rehearing en banc were subsequently denied. Of the circuit's nine active judges, four supported en banc review, expressing substantial agreement with Judge Oberdorfer's dissent. Three judges voted against en banc rehearing and two judges recused themselves. Thus, the en banc suggestions obtained the concurrence of a majority of the participating judges but a minority of the active judges (Pet. App. 94a-95a, 98a-99a).

ally Japan, an island nation historically and culturally tied to whaling, has firmly opposed comprehensive whaling moratoria in the past and now faces a difficult transition period in shutting down a significant domestic industry. As Japan's Charge d'Affaires noted, the agreement "avoid[s] a confrontation between our two countries" while "minimizing the economic and social hardship of those who are engaged in commercial sperm whaling" (Pet. App. 103a). The Secretary of Commerce has determined that this diplomatic compromise ultimately advances the goals of whale conservation.[17]

The court of appeals' decision repudiates this important achievement. The court errs on at least two counts. First, it mistakenly concludes that the Pelly and Packwood Amendments require the Secretary of Commerce automatically to certify any departure from International Whaling Commission harvest quotas as "per se diminish[ing] the effectiveness" (Pet. App. 41a-42a) of the International Convention for the Regulation of Whaling, regardless of the attendant circumstances. Second, it employs the extraordinary judicial remedy of mandamus in plainly inappropriate circumstances.

I. The Pelly and Packwood Amendments instruct the Secretary of Commerce to certify a foreign nation when he determines that its nationals are engaged in activities that "diminish the effectiveness" of the ICRW. The broad language of these statutes invests the Secretary with equally broad discretion—and responsibility—to determine whether specific whaling activities meet the "diminish the effectiveness" standard in any particular case. It places the decision exclusively within the informed judgment of the Secretary.

Indeed, the language is not only broad; it is also unqualified. The Pelly and Packwood Amendments do not direct the Secretary to consider any specific factors in reaching his conclusion nor do they require the Secretary to reach a particular conclusion in any specific case.

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[17] See Affidavit of Malcolm Baldrige (J.A. 107-113), reprinted as Addendum III, *infra*, 4a-9a.

Instead, they leave the determination to the informed discretion of the Executive Branch officer charged with specific responsibility for whale conservation and oceanic affairs. Under the plain language of these statutes, the Secretary is required to consider all relevant factors in determining whether a departure from an IWC harvest quota "diminishes the effectiveness" of the ICRW. His determination, which may turn on such factors as the nature, seriousness, and circumstances of the departure, can in no sense be considered a "ministerial" duty.

There is nothing unusual in this grant of discretion. Congress, recognizing the President's preeminent role in the conduct of foreign affairs and the need for flexibility in responding to international problems, traditionally delegates broad discretionary authority to the Executive Branch through the use of general terms. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 678-679 (1981); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-322, 324 (1936). The Pelly and Packwood Amendments, which employ a standard that relies upon an Executive Branch determination that certain activities "diminish the effectiveness" of international conventions, exhibit the familiar congressional deference to executive judgment in a matter affecting international relations.

The legislative history and background of the "diminish the effectiveness" standard confirm the Secretary's broad discretionary authority. That standard, a mainstay of the United States' international conservation programs, has been incorporated into five Acts of Congress over a period of 22 years. The legislative history of each of these Acts—the 1962 Amendments to the Tuna Conventions Act, the 1971 Pelly Amendment, the 1978 amendment of the Pelly Amendment, the 1979 Packwood Amendment, and the 1984 Eastern Pacific Tuna Licensing Act—reveals a consistent, repeated, and purposeful intention to preserve Executive Branch discretion. Congress plainly employs the "diminish the effectiveness"

standard to invoke the use of Executive Branch expertise and judgment in international conservation matters.

The legislative history is particularly persuasive on account of what it does *not* say. Nowhere in the legislative history is there an express authoritative statement that the Secretary must certify every nation that departs from international conservation quotas. Instead, the legislative history simply reflects the undisputed understanding that the Pelly and Packwood Amendments will frequently be applied in response to such departures.

Even if the plain language and legislative history were ambiguous, this Court should defer to the reasonable interpretation of the Secretary of Commerce, the Executive Branch official charged with administration of the statute. This deference is particularly appropriate in a statute dealing with international wildlife conservation, a subject that raises difficult scientific questions and delicate foreign relations issues.

The Secretary quite reasonably has interpreted the Pelly and Packwood Amendments to permit consideration of all relevant factors in the certification process. The Executive Branch must be able to apply its special knowledge of foreign relations, conservation dynamics, and treaty requirements to assure the maximum effectiveness of the ICRW. The present case tellingly illustrates the reasonableness of that interpretation. The United States, through the use of diplomacy and negotiation, has convinced Japan, the premier whaling nation, to dismantle its commercial whaling industry in exchange for a short-term continuance of limited whaling. This dramatic and important success for whale conservation could not be guaranteed through a strict rule of automatic certification in response to any quota violation. The mechanical approach advocated by respondents is both dangerous and unwise; it would increase disharmony among nations and impede international conservation efforts.

Thus, we submit that the Secretary may properly conclude that a foreign nation, such as Japan, that departs

Japanese whaling will cease at the end of the second such season, on April 1, 1988.

SUMMARY OF ARGUMENT

I

The language of the Pelly and Packwood-Magnuson Amendments, calling for a determination by the Secretary of Commerce whether certain conduct by foreign fishermen or whalers diminishes the effectiveness of an international fisheries conservation program, is plainly discretionary language, requiring the Secretary to exercise his informed judgment. Had Congress wished to impose upon him the duty of certifying any taking of fish or whales in excess of an international quota, it would have used quite different language.

The judgmental purport of the language is confirmed by the legislative history of the two statutes, a point that will be fully developed in the brief for the federal petitioners. Among the key items of the legislative history are (1) the understanding manifested in 1978, when the Packwood-Magnuson Amendment was enacted, by two key participants in the legislative process -- the chairman of the pertinent House subcommittee and the President -- that, under the existing Pelly Amendment and the new provision, certification was not mandatory for any and all violations of quotas but was

discretionary; and (2) the same understanding manifested in 1984 by the surviving author of the Packwood-Magnuson Amendment when he proposed a further amendment that would clearly have made certification and sanctions obligatory when a quota was exceeded.

Even if there were a serious question whether Congress intended to delegate authority to the Secretary of Commerce to exercise judgment with respect to certification under the Pelly and Packwood-Magnuson Amendments, he himself has so construed his authority. That construction by the responsible administrator of the statute is reasonable, and it must therefore be respected by a reviewing court. *Chevron, U.S.A.* v. *Natural Resources Defense Council*, 104 S. Ct. 2778 (1984).

To read the two statutes as requiring the Secretary of Commerce to certify a foreign nation in every case in which an international fisheries quota is exceeded is to raise unnecessarily a serious constitutional question -- the question whether sovereign power of the United States has been unlawfully delegated to an international body, the International Whaling Commission. The improper delegation objection is avoided only if the statutes are read as providing for the intervention of an exercise of judgment on the part of a United States official before sanctions are imposed to enforce such a body's decision.

II

A long-standing rule of statutory construction, reiterated and applied by this Court two years ago in *Trans World Airlines* v. *Franklin Mint Corp.*, 104 S. Ct. 1776, 1783 (1984), requires that Congress express itself clearly and unambiguously if it is to be deemed to have abrogated or modified an existing treaty. In this case the relevant treaty, the ICRW, expressly provides in Article V-3 that a nation may exempt itself from a quota established by the IWC. If the United States imposes sanctions on such a nation for exceeding a quota that by the terms of the Convention is not applicable to it, the result is the unilateral modification or abrogation by the United States of a right under a treaty to which it subscribes. The language of the Pelly and Packwood-Magnuson Amendments does not express clearly and unambiguously an intent to reach a nation that, by filing an objection, has made a whaling (or other) quota inapplicable to it. The history of the Amendments does not reflect any intent on the part of Congress to abrogate or modify the ICRW or other fishery treaties.

Application of the Pelly and Packwood-Magnuson Amendments to a nation that has filed an objection and thus exempted itself from an international fishery quota would place the United States in violation of international law. The Convention does not, explicitly or implicitly,

allow such an application of sanctions, and the coercion of a treaty signatory to forgo a treaty right is condemned by principles of international law. Moreover, it runs counter to the policy of the United States, which is to insist upon escape valves such as Article V-3 of the ICRW.

III

The case is not justiciable. It is not within the judicial power of a United States court to command an Executive Branch official to dishonor an international agreement, as the United States would be here required to dishonor the Murazumi-Baldrige Agreement. Under the test of justiciability stated in *Baker* v. *Carr*, 369 U.S. 196, 217 (1962), the courts below should have considered the consequences of judicial action, including "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." The nation is embarrassed by having to dishonor its word, by having to do so at the expense of foreign nationals who have acted in reliance on its word, and by so behaving that its word is regarded skeptically by all other nations.

Even if the case is justiciable, traditional equitable considerations demanded that the courts below stay their hands. An injunction is an equitable remedy that should be withheld

where the equities so warrant. The same thing is true if the order below is regarded as in the nature of mandamus. Here the equities weigh strongly in favor of the Secretary of Commerce and these intervening Japanese petitioners, on whom the judicially mandated sanctions would fall. The overriding equitable consideration is that the order of the courts below would have the United States repudiate an agreement on which these petitioners have relied and impose a sanction in retribution for the very conduct in which they engaged in good faith on the strength of the word of the United States.

ARGUMENT

The federal defendants will develop the arguments that:

> (1) on its face, the language of the Pelly and Packwood-Magnuson Amendments -- "diminish the effectiveness" -- calls for the exercise of judgment by the Secretary of Commerce in making his decision whether activities of foreign nationals in fact diminish the effectiveness of an international fishery conservation program, and particularly the International Convention for the Regulation of Whaling;

(2) the legislative history does not compel (or even seriously suggest) a reading of the statutes that departs from their plainly judgmental terms and instead imposes on a Cabinet officer acting in the delicate, shifting arena of international relations a ministerial duty to punish another nation; and

(3) in any event, the Secretary's reading of the statutes as calling for the exercise of his judgment is a reasonable, if not required, reading, and is therefore entitled to judicial deference -- greater deference than usual for the very reason that the statutes deal here with foreign relations.

Petitioners Japan Whaling Association and Japan Fisheries Association endorse those arguments fully. In Part I, petitioners state summarily the argument that will be fully developed in the government's companion brief, emphasizing certain aspects of the legislative history, and intending not to duplicate the government's brief. Also in Part I, these petitioners urge that a serious constitutional question of unlawful delegation is raised if the statutes are read as making the Secretary of Commerce a mere instrument for enforcing decisions of the International Whaling Commission.

Japan Whaling Association and Japan Fisheries Association, representatives of the Japanese citizens whose good faith whaling brought on the judicially mandated sanctions that the Court is considering and who would be immediately affected by the imposition of those sanctions, argue in this brief -- with the approbation of their government -- that the statutes do not require the imposition of the sanctions for a more fundamental reason: Under the ICRW itself and therefore at international law, Japan, having filed objections to the IWC quotas in question, is exempt from those quotas and legally free to ignore them.

Domestic United States statutes should not and indeed cannot, consonantly with international law, be construed as providing for the mandatory imposition of sanctions against a nation that has done no wrong in the eyes of its treaty partners (which include the United States) or in the eyes of the international community more generally. That argument is developed in Part II hereunder.

In Part III, these petitioners urge that the subject matter of the suit is such that it should not have been entertained and that, in any event, no United States court can or properly should enter the order that has been entered in this case. Limitations on judicial power and considerations of equity counsel against any judicial order compelling a high official to act in

breach of an international agreement that he has concluded with a friendly nation, on which that nation and its citizens have relied in good faith, and to impose upon the friendly nation for that very reliance the precise penalty that both parties intended the agreement to avoid.

I. THE PELLY AND PACKWOOD-MAGNUSON AMENDMENTS DO NOT REQUIRE THE SECRETARY OF COMMERCE TO CERTIFY AUTOMATICALLY ANY NATION WHOSE CITIZENS TAKE WHALES IN EXCESS OF AN IWC QUOTA.

The Secretary of Commerce concluded on the basis of his study of the scientific data, prior actions of the IWC, consultation with the United States Commissioner to the IWC, and the Japanese undertaking in the Murazumi-Baldrige Agreement that the taking by Japan of the limited number of whales allowed by the Agreement before Japanese commercial whaling was phased out would not diminish the effectiveness of the ICRW. That is plainly an allowable judgment under the terms of the governing statutes.

A. The Plain Meaning Of The Statutory Language Grants Discretion To The Secretary Whether To Certify.

On their face, the Pelly and Packwood-Magnuson Amendments authorize the

Secretary of Commerce to exercise discretion in determining whether to certify a nation for its whaling activities. The critical language in the Pelly Amendment, mirrored in the Packwood-Magnuson Amendment, directs the Secretary to certify a nation when he "determines that [its nationals], directly or indirectly, are conducting fishing operations . . . which diminish the effectiveness" of an international fishing conservation program. (App. 4a. *Cf. id.* at 7a.) Congress did not command the Secretary to certify any nation whose nationals take whales in excess of an IWC quota. Had that been its intent, it would have used language very different from language directing the Secretary to make the plainly judgmental determination whether conduct diminishes the effectiveness of a conservation agreement.

Such a determination requires an analysis of the fishing or whaling operations and the international conservation program in question; it also demands the application of the expertise of the Secretary and his subordinates, who are uniquely qualified to analyze the effect of such operations on the international program. A determination whether conduct diminishes the effectiveness of a multilateral treaty is no mere ministerial act. It calls, instead, for careful evaluation and ultimate resolution by a high-ranking Cabinet official of matters of great importance to United States conservation and foreign policy. In short, the plain meaning of

the statutes is to authorize the Secretary to exercise discretion.

B. The Legislative History Confirms That The Secretary Has Discretion Under The Statutes.

The legislative history of both the Pelly and Packwood-Magnuson Amendments confirms that the Secretary is meant to exercise his judgment in determining whether a nation has acted so as to diminish the effectiveness of the ICRW. Petitioners leave to the Solicitor General a full analysis of the legislative history and the lower courts' misapprehension of it. Petitioners invite the Court's attention to two points that merit particular attention.

First, statements made at the time of enactment of the Packwood-Magnuson Amendment in 1979, by a responsible legislator and by the final actor in the legislative process, the President, demonstrate that, under both Packwood-Magnuson and the earlier Pelly Amendment, the Secretary's determination whether a nation's actions diminish the effectiveness of the ICRW was understood to be a discretionary determination.

The effect of the Packwood-Magnuson Amendment was to make the imposition of sanctions mandatory when a nation is certified

for diminishing the effectiveness of the ICRW. Under the Pelly Amendment, the imposition of sanctions had been discretionary (and continues to be for other conservation programs).

Congressman Breaux, chairman of the Subcommittee on Fisheries and Wildlife Conservation and the Environment, of the House Merchant Marine and Fisheries Committee, carefully explained the change and made clear in doing so that under both Amendments the Secretary's original decision whether to certify was discretionary. He stated his understanding that "under the Pelly amendment, as it exists, there are really two areas in which there are optional actions that can be taken by the administration." *Hearings Before the Subcommittee on Fisheries and Wildlife and the Environment of the House Committee on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 314-15 (1979) [hereinafter cited as *Hearings*]. These, he continued, were:

> First, in certifying that a country is in violation of some international agreement, and there is a lot of flexibility in that certification [,] and, second, after a nation is certified there is still discretion in determining whether a ban on imports of that country's products will in fact be imposed against that country. Therefore, under Pelly we

> have two discretionary features, whereas in the Packwood amendment, you are really taking all of the discretionary features and putting them in the first category which is the certification of a nation being in violation of an international agreement.

The court of appeals dismissed what Congressman Breaux said, characterizing it as "ambiguous." (Pet. App. 36a n.20.) In reality, this statement is not in the least ambiguous. Congressman Breaux clearly stated, *Hearings*, *supra*, at 317, that "[t]he Secretary has the discretion in making a certification decision."

President Carter reiterated Congressman Breaux's point when he signed the Packwood-Magnuson Amendment into law. He said:

> With regard to both the Packwood-Magnuson and Pelly Amendments the Secretaries of Commerce and the Interior should work with the Secretary of State to take prompt action to ensure that all avenues of negotiation are fully exhausted before certification is made against any foreign nation.[4]

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[4] Presidential Signing Statement, 15 Weekly Comp. Pres. Doc. 1435 (Aug. 15, 1979).

Second, Senator Packwood, one of the sponsors of the Packwood-Magnuson Amendment, made clear his understanding of the Secretary's discretionary role when he introduced in 1984 a further amendment to the Magnuson Fishery Conservation and Management Act. His amendment would have eliminated any occasion for a judgmental determination by the Secretary of Commerce. His proposal was to "deem to be certified" for the purposes of the Packwood-Magnuson Amendment "[a]ny nation whose nationals conduct commercial whaling operations [after 1986] unless such whaling has been authorized by the International Whaling Commission." (App. 9a.) Had Senator Packwood believed that the 1979 amendment he authored already required certification of a country whose nationals were exceeding IWC quotas, he would not have proposed that further amendment. His amendment was defeated in a House-Senate Conference Committee. *See* Letter from Congressman Dante B. Fascell, Chairman of House Committee on Foreign Affairs, to Congressman Mervyn M. Dymally (Sept. 6, 1984) (App. 11a).

C. Deference Is Owing To The Secretary's Reasonable Construction Of The Statutes He Administers.

Apart from all else, the Secretary of Commerce in this case, and on prior occasions, has consistently construed the Pelly and Packwood-Magnuson Amendments as calling for a judgment on his part whether particular fishing or whaling activity diminishes the effectiveness of the ICRW or some other international fishing convention. His interpretation of the statutes is clearly correct, based on their language and their history, and is at the very least reasonable. It therefore commands the deference of a reviewing court under familiar principles that this Court has emphasized again and again in the last several terms. *See, e.g., Chevron, U.S.A.* v. *Natural Resources Defense Council*, 104 S.Ct. 2778, 2782 & n.9 (1984). *See also Chemical Manufacturers Association* v. *Natural Resources Defense Council*, 105 S. Ct. 1102, 1112 (1985); *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981); *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 75 (1975).

statements, the Pelly Amendment provides that the Secretary of Commerce should apply his informed judgment—through the "diminish the effectiveness" provision—to assess the particular impact of the infractions at issue in each individual case.[34]

The Pelly Amendment's legislative history is equally informative in light of what it does *not* say. Although respondents rely (Br. in Opp. 6) on "the strength of this extraordinarily pointed legislative history," they cite no passage that expressly asserts what they contend—the legislative record *nowhere* states that the Secretary has an "automatic, mandatory and nondiscretionary" duty to certify each and every foreign country whose nationals depart from fishery conservation quotas. Instead, the legislative history, like the language of the statute, indicates that the Secretary of Commerce should

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> Under the proposed legislation, *if* the action of *such* countries [i.e., countries not in compliance] *diminished the effectiveness of the international fishery conservation program,* consideration would need to be given to taking trade measures as necessary to support the conservation program.

[34] Rep. Pelly plainly recognized that his Amendment conferred substantial discretion, stating that "[t]he effectiveness of this legislation will depend upon the spirit and dedication to sound conservation of the agencies and individuals responsible for its enforcement." 117 Cong. Rec. 34752 (1971). Thus, he counseled against "inaction on the part of the Secretary of Commerce or the President," stating (*ibid.*):

> We are dealing with an aspect of foreign relations, and it is unwise to tie the hands of the Executive, but the enactment of this legislation represents a clear directive from the Congress to the President that the United States will not permit foreign countries which flount [*sic*] international conservation measures to profit through continued access to the American marketplace.

In a similar vein, Rep. Wylie, a co-sponsor of the bill, noted the important role that negotiation would continue to play under the legislation. *1971 House Hearings* 285 ("whenever any nation finds its exports to our country threatened, negotiations are advocated to promulgate conservation treaties which would be in the interest of the United States and the other nations involved").

exercise informed judgment in assessing whether these departures "diminish the effectiveness" of the particular conservation program at issue.[35]

Thus, enactment of the Pelly Amendment continued the congressional policy, initiated under the 1962 Amendments to the Tuna Conventions Act, of vesting the Secretary of Commerce with discretion to determine whether departures from international fishing quotas merit certification.[36]

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[35] Respondents and the court of appeals rely on scattered passages that, when read in context, simply indicate that the Pelly Amendment (1) *authorizes* the certification of nations that depart from international fishing quotas; and (2) would result in certification of Denmark on account of its flagrant departures from the ICNAF ban. See Br. in Opp. 8-9; Pet. App. 22a-25a. These passages do not support an inference that certification is "mandatory and nondiscretionary" (Pet. App. 42a) in every case in which a nation departs from harvest quotas.

Particularly infirm is respondents' contention (Br. in Opp. 9) that certification is mandatory because "the Pelly Amendment sanctions were created for the express purpose of penalizing nations that evaded overall limits on the catch or quotas." As this Court recently stated:

> The "plain purpose" of legislation, however, is determined in the first instance with reference to the plain language of the statute itself. * * * Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language may reflect hard fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Board of Governors v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 12. See, *e.g.*, *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985), slip op. 10-11. The Pelly Amendment's plain language expressly relies on the Secretary of Commerce's judgment to determine whether particular fishing operations "diminish the effectiveness" of a fishery conservation program. It demonstrates a purposeful intent to call upon particularized Executive Branch discretion to effectuate whale conservation goals.

[36] Notably, Denmark was never certified for its Atlantic salmon fishery. Rather, the United States reached an understanding with

3. *The 1978 Amendment of the Pelly Amendment.* If there were any doubts concerning application of the Pelly Amendment's "diminish the effectiveness" standard, they were erased by subsequent amendment of that Amendment. In 1978, Congress enlarged the scope of the Pelly Amendment as part of its extension of the Fishermen's Protective Act. The 1978 legislation authorized the Secretary of Commerce and the Secretary of the Interior to certify wildlife trafficking that "diminishes the effectiveness of any international program for endangered or threatened species." 22 U.S.C. 1978(a)(2).[37] The House Committee on Merchant Marine and Fisheries—which reported the original Pelly Amendment—specifically explained the purposes of the new provision. See H.R. Rep. 95-1029, 95th Cong., 2d Sess. 8-11 (1978). Its explanation again verifies that the Secretary of Commerce is to exercise informed judgment when applying the "diminish the effectiveness" standard.

Denmark in 1972 that called for a four-year phase-out of its high seas fishing. The substance of that understanding was eventually adopted by the ICNAF. See S.A. E1-E13. The Secretary of Commerce has invoked the Pelly Amendment on a number of other occasions when he has found that departures from IWC whale harvesting quotas have "diminished the effectiveness" of the ICRW. Respondents point to these certifications as evidence that the Secretary, in the past, *always* certified every nation that departed from international quotas (Br. in Opp. 16-18). Respondents' characterizations of the Secretary's past practice are inaccurate. In all events, the court of appeals concluded that "the record does not conclusively show what that practice has been" and that the dispute "does not present a genuine issue of material issue of fact" (Pet. App. 32a n.19).

[37] The modification added a new paragraph to the Pelly Amendment that closely mirrors the original language. It provides (22 U.S.C. 1978(a)(2)):

> When the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered species, the Secretary making such finding shall certify such fact to the President.

The Committee cited the past use of the Pelly Amendment to certify whaling nations that "harvested sperm, fin, and minke whales well in excess of IWC quotas," noting that the Amendment had proven to be "one of our most effective tools in the effort to conserve the world's greatest whales." H.R. Rep. 95-1029, *supra*, at 9.[38] The Committee observed that the proposed modifications could "expand the success the United States achieved in the conservation of whales to the conservation of endangered and threatened species" (*ibid.*). The Committee specifically addressed the "diminish the effectiveness" standard, stating (*id.* at 15):

> The nature of any trade or taking which qualifies as diminishing the effectiveness of any international program for endangered or threatened species will depend on the circumstances of each case. In general, however, the trade or taking must be serious enough to warrant the finding that the effectiveness of the international program in question has been diminished. An isolated, individual violation of a convention provision will not ordinarily warrant certification under this section.[39]

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[38] The Committee implicitly recognized that the Secretary exercised a substantial amount of discretion in determining whether the taking of whales in excess of harvest quotas "diminished the effectiveness" of the international convention, stating (H.R. Rep. 95-1029, *supra*, at 9 (emphasis added)):

> In November, 1977 the Secretary of Commerce reported to the President that two non-members of the IWC—Peru and Korea—were taking whales in excess of IWC quotas. In March 1978, the Secretary of Commerce reported to the subcommittee that *although these nations are violating IWC quotas*, certification under the Pelly amendment is pending a thorough documentation and substantiation of each action that may diminish the effectiveness of the IWC conservation regime.

On December 14, 1978, the Secretary of Commerce certified Peru, Chile, and Korea "based on the fact that those countries are not members of the IWC and their nationals harvest whales substantially in excess of IWC quotas established to protect whales from overharvesting." See Letter from the Secretary of Commerce to the President (J.A. 177).

[39] Remarkably, the court of appeals dismissed this statement as irrelevant, concluding that the phrase "diminish the effectiveness"

The legislative history of the 1978 modifications to the Pelly Amendment thus reiterates the well-established congressional understanding that the Secretary of Commerce

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has a different meaning depending on whether it is applied to endangered species treaties or fishery-related treaties (Pet. App. 38a-39a). It based this distinction, which it admitted might appear "overly formalistic" (*id.* at 39a), upon a mistaken understanding of the central endangered species treaty, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087. The court stated (Pet. App. 39a) that the Convention "operates in a manner entirely different from that of [*sic*] original Pelly Amendment." Whatever that statement means, it is clear that CITES *does* operate in a manner essentially identical to the fishing and whaling conventions. And contrary to the court's statement, CITES *does* provide for generally applicable regulations that are adopted through procedures substantially identical to those employed in the ICRW.

CITES regulates trade in endangered and threatened species through inclusion of those species in Appendix I (covering endangered species) and Appendix II (covering threatened species). CITES arts. II-IV, 27 U.S.T. at 1092-1097. Compare ICRW art. V, 62 Stat. 1718-1719 (regulating whaling through the use of a Schedule). CITES requires a two-thirds majority vote to amend an Appendix to include additional species. CITES art. XV, 27 U.S.T. at 1110-1112. Compare ICRW art. III, 62 Stat. 1717 (requiring a three-fourths majority vote to amend the Schedule). A nation may object to inclusion of a species within an Appendix; if it timely objects, it is expressly exempted from compliance with the CITES requirements governing import and export of that species. CITES art. XV, 27 U.S.T. at 1110-1112. Compare ICRW art. V, 62 Stat. 1719 (containing an analogous exemption provision). Thus, a nation that objects to the inclusion of a particular species within a CITES Appendix and then, for example, allows trade without the import and export permits required by CITES, is in the same position as a nation that objects to an IWC Schedule amendment and permits whaling in contravention of its requirements.

The court of appeals not only misunderstood CITES; it also failed to recognize that future endangered species treaties might impose specific quotas in the same manner as the ICRW. There is no indication in the legislative history that Congress intended the phrase "diminish the effectiveness" to be applied mechanically with respect to departures from fishing quotas, but to be applied flexibly with respect to departures from endangered species quotas. It strains credulity to believe that Congress intended to single phrase to have such significantly different meanings in two adjoining para-

(and the Secretary of the Interior) must be free to exercise informed judgment in applying the "diminish the effectiveness" standard. Plainly, this legislation, like the 1962 Amendments to the Tuna Conventions Act and the original 1971 Pelly Amendment, does not contemplate the mechanical rule that respondents now urge.

4. *The 1979 Packwood Amendment.* One year later, Congress enacted the Packwood Amendment, once again employing the "diminish the effectiveness" standard in a statute addressing an international conservation program. The Packwood Amendment provides that the Secretary of State must impose a severe economic sanction—a reduction, by at least 50%, of the foreign nation's fishery allocation in the United States fishery conservation zone—against any country whose nationals conduct whaling operations in a manner that, the Secretary of Commerce determines, "diminishes the effectiveness" of the ICRW. 16 U.S.C. 1821(e)(2). The legislative history of the Packwood Amendment, although rather limited, once again demonstrates that Congress intended the Secretary of Commerce to exercise informed judgment in applying that standard.

The Packwood Amendment was introduced on the Senate floor; thus, it did not receive explication in a legislative report.[40] The debates were relatively short. Sen.

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graphs of the same statutory subsection. See, *e.g.*, *Sedima, S.P.R.L.* v. *Imrex Co.*, No. 84-648 (July 1, 1985), slip op. 9; *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, 461 U.S. 624, 633 (1983).

[40] Sen. Packwood originally proposed legislation providing that no permit to fish in the conservation zone "may be issued to any vessel of any nation certified by the Secretary of Commerce under the provisions of [the Pelly Amendment]." S. 917, 96th Cong., 1st Sess. § 3 (1979); see S. Rep. 96-72, 96th Cong., 1st Sess. 6 (1979); 125 Cong. Rec. 8951 (1979). The Senate adopted that proposal (*id.* at 8952); however, it was deleted in the House bill (*id.* at 16432). The House Committee on Merchant Marine and Fisheries—which one year before had drafted the modification to the Pelly Amendment—and the Senate Committee on Commerce, Science and Transportation later concurred in a compromise bill, agreeing "to retain, but rewrite, the Packwood Amendment" in the form that was ulti-

Packwood described the purpose of the legislation as follows (125 Cong. Rec. 21742 (1979)):

> The core of the [Packwood Amendment] is simply that any foreign country which directly or indirectly conducts whaling operations or allows its nationals to conduct whaling operations or engage in trade in whale products in disregard of the conservation regulations of the International Whaling Commission shall be denied access to the rich fishery resources of our 200-mile zone.

This statement, as well as other floor comments, indicates the sponsors' general intent to put additional "economic teeth into our whale conservation efforts" (*ibid.*).

Congress plainly intended the Packwood Amendment to retain the same "diminish the effectiveness" standard utilized in the Pelly Amendment. Congress used the same language in both amendments; furthermore, the Packwood Amendment expressly refers to the Pelly Amendment's certification procedures. See 16 U.S.C. 1821(e)(2)(A)(i). As Rep. Breaux explained, the Packwood Amendment simply provides "a new sanction for the Secretary of State to utilize once a nation is certified as diminishing the effectiveness of the International Whaling Convention." 125 Cong. Rec. 22083 (1979).[41] Thus, in light of our foregoing discussion of the Pelly Amendment and related statutes, it naturally follows that Congress

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mately passed (*id.* at 22082) (Rep. Murphy). Thus, there was no need for a conference report (*ibid.*). Although the Amendment bears Sen. Packwood's name, Rep. Murphy apparently was the author of the compromise language (*id.* at 22082-22083).

[41] Other floor statements confirm that the Packwood Amendment did not alter the Secretary's certification discretion. See 125 Cong. Rec. 21743 (1979) (Sen. Magnuson) ("This amendment is a significant addition to the sanctions presently available under the Pelly Amendment."); *id.* at 22083 (Rep. Oberstar) ("[T]his authorization links the FCMA to certification under the Pelly Amendment."); *id.* at 22084 (Rep. Oberstar) ("In order to improve the effectiveness of the Pelly amendment, the legislation before us will provide for a specific penalty to result from certification."). The court of appeals agreed that the same certification standards apply under both amendments (Pet. App. 18a-21a).

intended to continue reliance on the Secretary's informed judgment to determine whether nations that depart from IWC harvest quotas should be certified.

Respondents nonetheless urge that the Secretary is required to certify automatically every departure from any IWC quota, asserting that "Congress intended reduced fishing rights in the U.S. Fishery Conservation Zone to be an automatic, mandatory and nondiscretionary sanction against any nation that intentionally allowed its nationals to violate IWC whaling quotas" (Br. in Opp. 8). However, respondents have produced no express authoritative statements of legislative intent to support that contention. Instead, they rely on a "common understanding" drawn from general statements in the floor debates, failing to distinguish between the inherently discretionary certification standard and the mandatory penalty that follows certification (*id.* at 10-11, 14-16).[42]

The floor debates contain a number of general statements—like that of Senator Packwood, quoted above—suggesting that the Packwood Amendment would provide new sanctions against foreign nations that "disregard," act "contrary to," or "violate" the ICRW and the resulting IWC regulations.[43] Congress plainly expected—quite

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[42] Respondents argue (Br. in Opp. 11) that "Congress did not mean to import by the back door into [the Packwood Amendment] certification the very same discretion it intended to remove when it tightened up Pelly's sanctions provision." However, Congress could reasonably conclude that the Secretary should continue to have broad discretion in determining whether whaling operations "diminish the effectiveness" of the ICRW, but further conclude that once the Secretary makes that determination, sanctions must be imposed. Indeed, Congress did just that. See note 46, *infra*.

[43] See 125 Cong. Rec. 21743 (1979) (Sen. Packwood) (the legislation "will prohibit those nations which violate the conservation regulations * * * from fishing within our 200-mile zone"); *ibid.* (Sen. Magnuson) ("if a foreign country is certified by the Secretary of Commerce for violating or diminishing the effectiveness of international whaling regulations * * * then that nation will be denied access to fish in our 200-mile fishery conservation zone"); *id.* at 22082-22083 (Rep. Murphy) ("any nation which the Secretary of Commerce has certified as being in violation of the IWC" will be

rightly in our view—that the Amendment would provide invaluable aid in "end[ing] the unnecessary and reckless violations of that agreement, and the irresponsible destruction of whales." 125 Cong. Rec. 22083 (1979) (Rep. Oberstar).[44] However, these broad aspirational statements, addressed to the undisputed general purpose of the legislation, do not shed light on the specific question at issue in this case. *None* of these statements purports to define the "diminish the effectiveness" standard. *None* of these statements expressly proclaims that the Secretary has an "automatic, mandatory, and nondiscretionary" duty to certify every violation of an IWC harvest quota. Instead, these statements simply demonstrate congressional agreement that departures from IWC regulations will—*as a general matter*—justify certification. They do not restrict the discretionary import of the "diminish the effectiveness" standard.[45]

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subject to sanction); *id.* at 22083 (Rep. Oberstar) ("the United States intends to enforce the [ICRW] and to end the unnecessary and reckless violations of that agreement"); *ibid.* (the Secretary of Commerce certifies a nation "found to have acted in a manner contrary to international agreements").

[44] Congress was particularly concerned by the emergence of "outlaw whaling"—whaling conducted by pirate ships that operate completely outside the ICRW regime. These ships paid no attention whatsoever to conservation regulations adopted by the IWC. See *Outlaw Whaling: Hearing on Whaling Operations Conducted Outside the Control of the International Whaling Commission Before the Senate Comm. on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. (1979).

[45] As we have previously observed (note 35, *supra*), broad statements directed to the general purposes of the statute cannot alter plain language. Likewise, they cannot define the content of particular statutory terms. This Court explained that principle in *Regan* v. *Wald*, No. 83-436 (June 28, 1984), stating (slip op. 14):

> Oral testimony of witnesses and Congressmen, unless very precisely directed to the intended meaning of particular words in a statute, can seldom be expected to be as precise as the enacted language itself. To permit what we regard as clear statutory language to be materially altered by such colloquies * * * would open the door to the inadvertent, or perhaps even

Indeed, the only floor statement specifically directed to application of the certification standard *supports* the Secretary's exercise of discretion. Rep. Breaux—who, as chairman of the House subcommittee that had primary responsibility for the legislation, necessarily understood the operation of the certification process—emphasized the discretionary content of the certification standard, stating, "I trust that the Secretary of Commerce will be especially careful to examine all the facts surrounding a possible certification if this law is enacted since a certification from this point on can have disastrous effects on our U.S. fishing industry." 125 Cong. Rec. 22083 (1979) (referring to possible retaliatory embargos against United States fish exports).[46]

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planned, undermining of the language actually voted on by Congress and signed into law by the President.

The floor statements in this case fall far short of the necessary direction and precision to alter the meaning of a familiar statutory term. Furthermore, President Carter, in signing the Packwood Amendment into law, plainly recognized that certification would require the exercise of judgment, stating:

> With regard to both the Packwood[] and Pelly amendments, the Secretaries of Commerce and the Interior should work with the Secretary of State to take prompt action to ensure that all avenues of negotiation are fully exhausted before certification is made against any foreign nation.

2 Public Papers of the President 1435 (1979) (Administration of Jimmy Carter). Finally, we note that the Packwood Amendment's language was the product of compromise (see 125 Cong. Rec. 22082-22083 (1979)); hence, this Court should be chary of relying on the statements of individual congressmen, in lieu of the statutory language, to determine congressional intent. See *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 12. See also *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 75 (1982).

[46] Rep. Breaux correctly explained the discretionary nature of the certification process in subcommittee hearings concerning the Packwood Amendment, stating (emphasis added):

> I understand under the Pelly amendment, as it exists, there are really two areas in which there are optional actions that can be taken by the administration.
>
> First, in certifying that a country is in violation of some international agreement, *and there is a lot of flexibility in that*

In sum, the Packwood Amendment, like the three Acts of Congress that preceded it, plainly contemplated that

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certification and, second, after a nation is certified, there is still discretion in determining whether a ban on imports of that country's products will be in fact imposed against that country. Therefore, under Pelly we have two discretionary features, whereas in the Packwood amendment, *you are really taking all of the discretionary features and putting them into their first category which is the certification of a nation being in violation of an international agreement.*

Fishery Conservation and Management Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 96th Cong., 1st Sess. 314-315 (1979) [hereinafter cited as the *June 26, 1979 House Hearings*]. Respondents mistakenly suggest (Br. in Opp. 11-12) that Rep. Breaux had a contrary understanding of the Pelly Amendment, relying on his statements nearly one month earlier in oversight hearings on whaling. *Fish and Wildlife Miscellaneous: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. Pt. 1 (1979) [hereinafter cited as the *June 4, 1979 House Hearings*]. Plainly, Rep. Breaux's later statements, based on a more thorough examination of the statutes and directed specifically to the Packwood Amendment, give a better picture of his understanding. In all events, his statements in both hearings are consistent. In the June 4, 1979 Hearings, Rep. Breaux asked Richard Frank, Administrator of the National Oceanic and Atmospheric Administration, if the Pelly Amendment would apply to certain whaling activities. Mr. Frank responded in part (*id.* at 312 (emphasis added)):

> If a country were violating something in the schedule, for example, taking more whales than the schedule provides, *and that were a significant violation*, I believe it is clear that the Pelly Amendment would apply.

Rep. Breaux later summarized Mr. Frank's testimony to other witnesses as follows (*id.* at 359):

> Apparently Dick Frank is saying that the taking of whales in violation of IWC quotas is something that automatically would require the Department of Commerce to certify that nation as being in violation of the taking provision. Then you get into two other categories, not supplying enough data and the importation of whale meat. They say they have some problems certifying that as a violation.

Thus, Rep. Breaux's summary statement plainly referred only to takings that the Secretary considered significant.

the Secretary of Commerce would continue to apply informed judgment in exercising its certification authority.

5. *The 1984 Pacific Tuna Licensing Act.* The passage of the Packwood Amendment did not mark the last time that Congress conferred Executive Branch discretion through the "diminish the effectiveness" standard. Just two years ago, Congress employed this standard in the Eastern Pacific Tuna Licensing Act of 1984 (EPTLA), 16 U.S.C. (Supp. II) 972 *et seq.*, to govern whether American fishing boats, seized by foreign nations for violation of the Eastern Pacific Ocean Tuna Fishing Agreement, are entitled to compensation under the Fishermen's Protective Act of 1967, 22 U.S.C. 1971 *et seq.* The legislative history of the EPTLA reveals that Congress has once again used the "diminish the effectiveness" standard to authorize the exercise of informed judgment.

The Eastern Pacific Ocean Tuna Fishing Agreement provides "an international licensing arrangement for tuna fishing in a broad area of the eastern Pacific Ocean," that also permits "conservation measures under specified circumstances." S. Exec. Rep. 98-13, 98th Cong., 1st Sess. 1 (1983). See S. Treaty Doc. 98-3, 98th Cong., 1st Sess. 3 (1983). The EPTLA, in implementing the Agreement, specifies that U.S. vessels lawfully seized by a member country for a violation of the agreement or accompanying regulations are ineligible for compensation under the Fishermen's Protective Act unless the Secretary of State determines that the violation "is not of such seriousness as to diminish the effectiveness of the Agreement." 16 U.S.C. (Supp. II) 972c. This provision thus ensures that the Secretary of State can exercise informed discretion in determining whether American fishermen who violate an international agreement can nevertheless receive federal benefits that would otherwise be unavailable.

This statute demonstrates, once again, a clear congressional understanding that not all departures from an international agreement necessarily "diminish" its "effectiveness." Furthermore, it again corroborates that Congress has employed the "diminish the effectiveness" standard in this field as a term of art, authorizing the Execu-

tive Branch to exercise informed judgment that will take into account the nature and seriousness of the particular conduct in question.[47] Concomitantly, this statute, while enacted after the Pelly and Packwood Amendments, provides yet another illustration of the inherently discretionary content of the "diminish the effectiveness" standard.[48]

Thus, the legislative history of the "diminish the effectiveness" standard, from its genesis in the 1962 Amendments to the Tuna Conventions Act, to its most recent use in the EPTLA, demonstrates a consistent congressional understanding that the standard provides the Executive Branch with broad discretion—and, indeed, the important responsibility—to evaluate the nature, seriousness, and circumstances of departures from international conservation programs. The legislative history nowhere contains an express authoritative pronounce-

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[47] This legislation was reported by the House Committee on Merchant Marine and Fisheries and the Senate Committee on Commerce, Science, and Transportation, the same committees that considered the Pelly and Packwood Amendments. The House Report specifically recognized the Secretary's broad discretion, stating:

> It is the Committee's view that while failure of a seized vessel to have a license must be considered an action which diminishes the effectiveness of the [Agreement] the seriousness of a violation of a conservation regulation would need to be determined by the Secretary.

H.R. Rep. 98-721, 98th Cong., 2d Sess. 5 (1984). Notably, the Committee suggested that only a direct violation of the licensing provisions—which are specified *by the Agreement itself* (art. IV, *reprinted in* S. Treaty Doc. 98-3, *supra*, at 3)—would, of necessity, "diminish the effectiveness" of the Agreement. The Committee indicated that violations of conservation regulations—which, like the IWC harvest quotas, are promulgated by agreement of an implementing commission (art. III, *reprinted in* S. Treaty Doc. 98-3, *supra*, at 2-3)—would be left to the Secretary's discretion.

[48] See *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 391 (1983) ("the same respect for the rule of law that requires us to seek consistency over time also requires us, if with somewhat greater caution and deliberation, to seek consistency in the interpretation of an area of law at any given time").

ment that the Secretary has an "automatic, mandatory, and nondiscretionary" duty to certify all departures from IWC whale harvesting quotas. To the contrary, it obviously contemplates that negotiation and diplomacy will not be wholly displaced by a regime of automatic sanctions.

C. Even if the plain language and legislative history were open to debate, this Court should defer to the Secretary's reasonable interpretation of the statutes

It is our position that the plain language of the Pelly and Packwood Amendments, supplemented by the legislative history, conclusively establishes that the Secretary may exercise informed judgment in determining whether a departure from an IWC whale harvest quota "diminishes the effectiveness" of the ICRW. But even if there were any doubt, the Secretary's reasonable construction of these statutes should control.

This Court has repeatedly admonished:

> If * * * Congress has not addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative determination. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A. Inc. v. *NDRC*, No. 82-1005 (June 25, 1984), slip op. 4-5 (footnote omitted).[49] The foregoing discussion demonstrates at the very minimum that Congress did not have a clear and specific intent that the Secretary must certify every departure from IWC quotas.

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[49] See also, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9 ("An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress."); *Chemical Manufacturers Ass'n* v. *NRDC*, No. 83-1013 (Feb. 27, 1985), slip op. 8-9 (The "view of the agency charged with administering the statute is entitled to considerable deference * * *.").

adhering to an international whaling quota which is not binding on it.

III. COMMANDING THE EXECUTIVE TO DISHONOR AN INTERNATIONAL AGREEMENT SUCH AS THE MURAZUMI-BALDRIGE AGREEMENT EXCEEDS PRUDENTIAL AND EQUITABLE LIMITATIONS ON JUDICIAL AUTHORITY.

A. Giving A Command To An Official Of The United States To Dishonor An International Agreement Is Beyond The Authority Of United States Courts.

The majority below failed to consider the question whether this case presents a justiciable question. As Judge Oberdorfer noted, "the justiciability issue is important and should ordinarily be decided before reaching the merits." (Pet. App. 49a.) "The hazards of such judicial involvement in issues ordinarily reserved for the political departments of our government could make this controversy unsuitable for judicial action." (*Id.* at 50a.)

The Supreme Court ruled in *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918):

> The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and

> Legislative -- "the political" -- Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

The Court has subsequently reaffirmed that "[t]he President alone has the power to speak or listen as a representative of the nation," *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), and that "the President is exclusively responsible" for the "conduct of diplomatic and foreign affairs," *Johnson* v. *Eisentrager*, 339 U.S. 763, 789 (1950). "Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of governments as to be largely immune from judicial inquiry or interference.' " *Regan* v. *Wald*, 82 L. Ed. 2d 171, 186 (1984) (citation omitted).

One of the tests of whether a case is nonjusticiable is "the possible consequences of judicial action." *Baker* v. *Carr*, 369 U.S. 186, 211-12 (1962). If one of the "possible consequences of judicial action" is "embarrassment from multifarious pronouncements by various departments on one question," judicial action is barred. *Id.* at 217.

In this case the most severe embarrassment results from the action of the courts below:

(1) The Executive Branch is directed to dishonor the Murazumi-Baldrige Agreement, thereby resulting in a violation by the United States of international law and the disruption of relations between the United States and Japan.

(2) Foreign nations other than Japan are bound to look skeptically at the pledged words of the United States if judges are empowered to hold them for naught.

(3) The United States is placed in the untenable position of imposing massive sanctions on a country and its nationals for their very reliance on the word of the United States.

Clearly, these possible untoward consequences make this case, as Judge Oberdorfer suggested, "unsuitable for judicial action." (Pet. App. 50a.)

B. A Judicial Command To Dishonor An International Agreement And To Impose Severe Sanctions On Nationals Of A Friendly Nation For Conduct Authorized By The Agreement Is An Abuse Of The Court's Equity Powers.

Judge Oberdorfer concluded that "it was not necessary . . . to determine whether the case is justiciable" (Pet. App. 50a-51a), in part because it was clear to him that equitable considerations counseled so strongly against the mandatory order entered by the district court. The same prudential considerations that call justiciability into question also call into question whether it was proper for the district court to exercise its equity powers at all in this case. These prudential considerations call for reversal of the district court's order, especially when evaluated in conjunction with traditional equity concerns, which militate strongly against the particular equitable choices made by the courts below.

The order violates the long established maxim that equity must do equity and the Supreme Court's holding that "the essence of equity jurisdiction has been the power of the Chancellor to do equity." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). This is a case in which equities had to be weighed before relief was granted, for "an injunction is an equitable

remedy. It 'is not a remedy which issues as of course.'" *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 311 (1982) (quoting *Harrisonville* v. *W.S. Dickey Clay Manufacturing Co.*, 289 U.S. 334, 337-38 (1933)). The issuance of an injunction is in the sound discretion of the court. "[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." 456 U.S. at 313. And "[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* at 312. The necessity to weigh the equities is not different if the case is regarded as one of mandamus. "[M]andamus is itself governed by equitable considerations and is to be granted only in the exercise of sound discretion." *Whitehouse* v. *Illinois Centra. Railroad*, 349 U.S. 366, 373 (1955).

Here the equitable considerations arguing against an injunction or mandamus are extraordinarily strong and, as Judge Oberdorfer said, "weigh heavily in favor of the Secretary." The Government of the United States, through the Secretary of Commerce, has given its word in the reasonable understanding of the Pelly and Packwood-Magnuson Amendments that it has the authority to do so. The Government of Japan has made a reciprocal promise and acted on that promise to its detriment in reasonable reliance on the word of the United States.

Equity does not empower the district court to have entered the order it did, breaking the word of the United States and inflicting severe hardship on Japan and its nationals.

The Government of Japan was entitled to rely on the United States Government adhering to the Murazumi-Baldrige Agreement. Concerned over the threat of certification in 1984, Japan followed the ordinary and usual course available to foreign countries. It negotiated with the Executive Branch authorities responsible for implementing the statutes in question, relinquished its international treaty right to exempt itself from unacceptable IWC decisions, and agreed to limit and eventually discontinue its nationals' legitimate whaling activity. Japan made these major concessions with the assurance from the responsible United States authorities that, if Japan carried out its duties and obligations under the negotiated Agreement, the United States would fulfill its promise not to certify or sanction Japan for activities authorized by that Agreement.

Japan has performed its part of the bargain. It unconditionally withdrew its objection to the sperm whale quota, effective April 1, 1988, and it is committed to withdraw its objection to the moratorium upon the favorable outcome of this case. (Pet. App. 116a-17a.) It has taken these actions despite its conviction that the quotas to which those

objections would apply were not adopted in accordance with the requirements of the ICRW.

In addition, the Government of Japan has issued licenses to members of petitioner Japan Whaling Association as permitted by the Agreement, and it has ensured that those members have scrupulously adhered to the Agreement's limits. Japanese whalers have reduced their take of sperm whales from over 5000 whales in the 1977-78 coastal season to 400 whales in the 1984-85 season and the current 1985-86 season. They have promised to take no more than 200 whales in each of the 1986-87 and 1987-88 seasons, and to take *no* whales after April 1, 1988 -- promises that will be kept as faithfully as the promises for the current and preceding seasons have been kept. In view of such good faith performance of and reliance on the Murazumi-Baldrige Agreement, it cannot be said that the order of the district court is a sound exercise of equitable discretion. Rather, "such a major departure from that long tradition [equity must do equity] as is here proposed" should not be allowed to stand. *Hecht Co.* v. *Bowles*, 321 U.S. at 330.

Equitable powers may not be used to inflict a penalty, particularly when those who would be punished have not personally done wrong. *Hartford Empire Co.* v. *United States*, 323 U.S. 386, 434-35 (1945). "Mandamus is not a punitive remedy." *Will* v. *U.S.*, 389 U.S. 90, 107 (1967). Although the

order in this case does not penalize the Secretaries of Commerce and State, it does inflict an undue penalty on Japan and particularly on members of petitioner Japan Fisheries Association. These innocent third parties depend on fishing in United States waters and on sales of fish for import to the United States, privileges that the district court's order would deny them. They could not possibly have taken any action to avoid such punishment. It would be difficult to postulate a more extreme perversion of the traditional principle that equity must do equity. *See Hecht Co.* v. *Bowles*, 321 U.S. at 329.

As Judge Oberdorfer concluded, the ultimate equity here is that the United States and Japan made reciprocal promises based on a reasonable interpretation of the Pelly and Packwood-Magnuson Amendments, and based on a host of scientific, diplomatic, economic, and prudential considerations that are beyond the competence of the judiciary to evaluate. Even if these considerations do not require the courts to stay their hands, the equities that "weigh heavily in favor of the Secretary" and Japan precluded such a use of equitable powers as the district court employed. In the interests of "elementary fairness," *Moser* v. *United States*, 341 U.S. 41, 47 (1950), the United States should not be allowed, much less compelled by the judiciary, to dishonor its word.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING

[PREAMBLE]

The Governments whose duly authorized representatives have subscribed hereto,

Recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks;

* * *

Recognizing that the whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the numbers of whales which may be captured without endangering these natural resources;

Recognizing that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress;

* * *

Desiring to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks on the basis of the principles embodied in the provisions of the

International Agreement for the Regulation of Whaling signed in London on June 8, 1937 and the protocols to that Agreement signed in London on June 24, 1938 and November 26, 1945; and

Having decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry;

Have agreed as follows:

* * *

ARTICLE V

* * *

2. These amendments of the Schedule (a) shall be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources; (b) shall be based on scientific findings; . . . and (d) shall take into consideration the interests of the consumers of whale products and the whaling industry.

3. Each of such amendments shall become effective with respect to the Contracting Governments ninety days following notification of the amendment by the Commission to each of the Contracting Governments, except that (a) if

any Government presents to the Commission objection to any amendment prior to the expiration of the ninety-day period, the amendment shall not become effective with respect to any of the Governments for an additional ninety days; (b) thereupon, any other Contracting Government may present objection to the amendment at any time prior to the expiration of the additional ninety-day period, or before the expiration of thirty days from the date of receipt of the last objection received during such additional ninety-day period, whichever date shall be later; and (c) thereafter, the amendment shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn. The Commission shall notify each Contracting Government immediately upon receipt of each objection and withdrawal and each Contracting Government shall acknowledge receipt of all notifications of amendments, objections, and withdrawals.

APPENDIX B

PELLY AMENDMENT
22 U.S.C. § 1978(a)

Restriction on importation of fishery or wildlife products from countries which violate international fishery or endangered or threatened species programs

Certification To President

(a) (1) When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.

(2) When the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary making such finding shall certify such fact to the President.

* * *

(4) Upon receipt of any certification made under paragraph (1) or (2), the President may direct the Secretary of the Treasury to prohibit

the bringing or the importation into the United States of fish products (if the certification is made under paragraph (1)) or wildlife products (if the certification is made under paragraph (2)) from the offending country for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade.

Notification To Congress

(b) Within sixty days following certification by the Secretary of Commerce or the Secretary of the Interior, the President shall notify the Congress of any action taken by him pursuant to such certification. In the event the President fails to direct the Secretary of the Treasury to prohibit the importation of fish products or wildlife products of the offending country, or if such prohibition does not cover all fish products or wildlife products of the offending country, the President shall inform the Congress of the reasons therefor.

Importation Of Fish Products From Offending Country Prohibited

(c) It shall be unlawful for any person subject to the jurisdiction of the United States knowingly to bring or import into, or cause to be imported into, the United States any fish

products or wildlife products prohibited by the Secretary of the Treasury pursuant to this section.

APPENDIX C

PACKWOOD - MAGNUSON AMENDMENT 16 U.S.C §1821(e)(2).

(A) For the purposes of this paragraph --

(i) The term "certification" means a certification made by the Secretary [of Commerce] that nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling. A certification under this section shall also be deemed a certification for the purposes of section [8(a) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978 (a))].

(ii) The term "remedial period" means the 365-day period beginning on the date on which a certification is issued with respect to a foreign country.

(B) If the Secretary issues a certification with respect to any foreign country, then each allocation under paragraph (1) [§ 201(e)(1), 16 U.S.C. § 1821(e)(1)] that --

(i) is in effect for that foreign country on the date of issuance; or

(ii) is not in effect on such date but would, without regard to this paragraph, be

made to the foreign country within the remedial period;

shall be reduced by the Secretary of State, in consultation with the Secretary, by not less than 50 percent.

APPENDIX D

PROPOSED PACKWOOD AMENDMENT TO THE PACKWOOD-MAGNUSON AMENDMENT REJECTED BY HOUSE-SENATE CONFERENCE COMMITTEE, AND ACCOMPANYING LETTER OF CONGRESSMAN FASCELL, CHAIRMAN, HOUSE COMMITTEE ON FOREIGN AFFAIRS

Sec. 301. Section 201(e)(2)(A)(i) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1821(e)(2)(A)(i)) amended by inserting the following immediately after the first sentence thereof: "Any nation whose nationals conduct commercial whaling operations during or after the 1985/1986 pelagic whaling season or the 1986 coastal whaling season, unless such whaling has been authorized by the International Whaling Commission, shall be deemed to be certified for the purposes of this paragraph. Such nations shall also immediately be subject to the sanctions provided by paragraph (B) of this paragraph as soon as the Secretary has determined that such commercial whaling operations are being conducted.".

Sec. 302. Section 8(a) of the Fishermen's Protective Act 1967 (22 U.S.C. 1978(a)) is amended by adding at the end thereof the following:

"(5) A certification under this section which results from matters relating to whaling shall also be deemed a certification for purposes

of section 201(e)(2) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1821(e)(2)).".

Congress of the United States
Committee on Foreign Affairs
House of Representatives
Washington, D.C. 20515

September 6, 1984

The Honorable Mervyn M. Dymally
U. S. House of Representatives
Room 1717 Longworth House Office Building
Washington, D.C. 20515

Dear Merv:

Thank you for your recent letter and copies of your letter to Secretary of State George Shultz and recent statement from the Congerssional Record.

I appreciate your concern regarding the possibility that U.S. legislation would increase the severity of sanctions under the Magnuson Fishery Conservation and Management Act. My understanding is that the amendment proposing such sanctions was defeated in the House-Senate Conference on S. 2463, and that the Department of State opposed that amendment.

I am asking Peggy Galey of the Committee staff to follow-up on this matter with your office.

With best wishes, I am

Sincerely yours,

/s/Dante

Dante B. Fascell
Chairman

APPENDIX E

EXCERPT FROM TRANSCRIPT OF THE TREATY NEGOTIATIONS OF THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING

Statement of R. Kellogg, Smithsonian Institution Archives, Record Unit 7165, International Whaling Commission, 1930-1968 Records, Box 9

[Dr. Remington Kellogg presented the United States position as follows (emphasis added).]

The delegation of the United States of America wishes to present the following observations concerning the establishment of a permanent commission of the regulation of whaling for the consideration of the Conference.

The Government of the United States of America favors in principle the eventual establishment by international agreement of a *standing committee with powers to make recommendations* regarding minimum lengths of whales, quotas, lengths of seasons, protected species, sanctuaries, and notification of take, such recommendations to become effective upon approval by the governments parties to the agreement. As the delegates are aware, this is the plan followed in various fishery treaties to which the Government of the United States of America is a party and which it has under consideration. *The advantages of*

this plan, whereby regulations are proposed by an expert international committee on the basis of scientific research and are put into effect by approval of each of the governments concerned, over the present method of a new treaty for each change or amendment, are obvious, particularly in view of the necessity for submitting each new treaty of this type to the United States Senate, with the resulting delays and burdens of dealing with administrative routine placed upon that body.

While this Government would, therefore, give favorable consideration to the establishment of an effective administrative machinery *for modifiying in specified minor respects* the terms of the international agreements on regulation of whaling, *it is not prepared at the present time to enter into any agreement for the establishment of an international commission having powers to modify the terms of agreements without the governments concerned having an opportunity to consider and approve or reject such suggested modifications before they become effective.* This Government would not under present conditions be disposed to empower any such commission to make regulations which would become effective without reference of such regulations to the several parties to the agreement for the approval prior to entry into effect.